

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD WALTERS
Claimant

VS.

GARY HEATH DRYWALL CONSTRUCTION
Respondent

AND

**GENERAL CASUALTY COMPANY OF
WISCONSIN**
Insurance Carrier

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Docket No. 1,043,369

ORDER

Respondent Gary Smith Drywall Construction and its insurance carrier General Casualty Company of Wisconsin (General Casualty) appeal the April 6, 2009, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was found to have suffered an accidental injury which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Steffanie L. Stracke of Kansas City, Missouri. Respondent Gary Heath Drywall Construction and its insurance carrier appeared by their attorney, Timothy G. Lutz of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held March 31, 2009, with attachments; and the documents filed of record in this matter.

At the preliminary hearing of March 31, 2009, the parties stipulated that for preliminary hearing purposes, Gary Heath Drywall Construction was the statutory employer in this case.¹ Respondent acknowledged that Smith Drywall was a subcontractor

¹ K.S.A. 44-503.

of Gary Heath Drywall.² Archie E. Smith, Jr. (J.R.), owner of Smith Drywall, acknowledged that he did not have workers compensation insurance.³

ISSUE

Did claimant meet with personal injury by accident arising out of and in the course of his employment? Claimant alleges that on the morning of November 24, 2008, he suffered an injury to his low back and right lower extremity while working for respondent when he fell while performing drywall work. Respondent argues that Mr. Smith, the owner of Smith Drywall, was present the entire morning and never witnessed claimant suffer a fall or any injury while on the job. Claimant alleges that Mr. Smith was gone for several hours on the date of accident, making his child support payment. The only issue before the Board is whether claimant suffered an accidental injury which arose out of and in the course of his employment on the date alleged.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was working for Smith Drywall on November 24, 2008, at a commercial business located at 7th and Massachusetts in Lawrence, Kansas. Claimant was performing drywall work. Specifically, he was skimming drywall. He was walking on stilts, skimming 13-foot ceilings.

It was claimant's understanding that Smith Drywall had been contracted to do work at that site by Gary Heath Drywall Construction. Claimant was paid \$500 a week by Smith Drywall and he was paid in cash.

When claimant and Mr. Smith first got to the job site on the morning of November 24, 2008, Mr. Smith helped unload the truck and then he mixed some mud for claimant. Then Mr. Smith left claimant there alone to work.

Another employee of Smith Drywall had been present that morning. However, while they were unloading the truck, Mr. Smith and this individual (Gene Edgerton) had some

² P.H. Trans. at 6.

³ P.H. Trans. at 117.

words. This individual did not give Mr. Smith two days notice of a doctor's appointment, so Mr. Smith told this individual that he did not need him anymore.

Claimant was working on stilts which are 48 inches tall to the highest notch. These stilts belonged to Mr. Smith. On November 24, 2008, while working on those stilts, claimant was walking along skimming. There was wet mud on the floor, and the stilts slipped out from underneath claimant and he fell flat on his back. This accident happened at about 11:45 a.m. There was no one else present at the time of claimant's fall. However, claimant did testify that a Rueschoff Fire Systems installer was present installing sprinklers or fire alarm systems when claimant was on the stilts. That person is not further identified in this record and his testimony was not obtained. Mr. Smith did not remember anyone from Rueschoff being present that day.

Claimant testified that when Mr. Smith returned to the job site, which claimant thinks was at around 12:00 noon, claimant told him that he needed to take a lunch break, and that he had gotten hurt and that he needed to get some medical treatment. After claimant told Mr. Smith this, Mr. Smith quit talking to claimant and he offered no assistance to claimant.

After claimant returned from lunch, he tried to go back to work. However, he was not able to finish out the day. Claimant asked to use Mr. Smith's phone to call his wife. And claimant's wife then came and picked claimant up. Claimant told Mr. Smith that he was going to the doctor. Mr. Smith knew that claimant had fallen. Claimant's wife picked him up at the job site at about 2:00 p.m.

Rather than go to Lawrence Memorial Hospital, which was about three to four minutes from the job site, claimant was driven to Providence Medical Center in Kansas City, Kansas. This took about 30 to 45 minutes. However, the check-in time at Providence Medical Center emergency room showed an admission time of 18:40 or 6:40 p.m. Claimant testified that they waited in the emergency room for a while before he was checked in. Claimant was examined by the emergency room physician at 19:10 or 7:10 p.m. Claimant testified that he did not leave the emergency room until about midnight. The emergency room records indicated that claimant was experiencing tenderness in his mid and upper thoracic area. When claimant returned to the emergency room on November 28, 2008, he was experiencing low back pain with radiculopathy into his right leg.

Mr. Smith testified that claimant was hired on November 17, 2008, to help Mr. Smith complete two jobs. The one at 7th and Massachusetts was as a subcontractor to Gary Heath Drywall, doing only the taping part of the drywall. Mr. Smith was under a deadline to finish the job. He also hired Gene Edgerton for that job, but when Mr. Edgerton advised Mr. Smith that he had to leave early on November 24 to attend a doctor's appointment, Mr. Edgerton was sent home and only claimant remained to help with the taping job.

Mr. Smith's testimony of the events leading to the alleged injury are substantially different from claimant's. Mr. Smith stated that claimant was working on scaffolding, not stilts, as the ceilings were 14 feet high and the stilts were not at the job site. In fact, claimant had not been on stilts for several years, as the weight limit on the stilts was 230 pounds and claimant weighed too much to work on the stilts. Mr. Smith stated that he never left the job site on the date of the alleged accident. Although on cross-examination, he did admit that he may have left at one point to make his child support payment. However, he would only have been gone about 10 minutes. Claimant had earlier testified that Mr. Smith was gone about four hours. Mr. Smith also testified that they were doing no skimming that day and he did not mix any mud for claimant. Mr. Smith denied that claimant ever mentioned a work-related injury to him. The first time he was made aware of an alleged work injury was when he received a letter from claimant's attorney.

When claimant went to lunch, he was gone about one hour. When he returned, Mr. Smith smelled alcohol on his breath and claimant was immediately sent home. Claimant has had a long-term drinking problem, having lost his drivers license for several years, having been convicted of driving under the influence of alcohol (DUI) 13 times and having spent a total of 4½ years in jail, a portion of which was for alcohol-related problems. Claimant and Mr. Smith also disagree as to whether claimant has consumed alcohol recently. Claimant testified that he had been sober and not consumed alcohol since February 2008. Mr. Smith testified that claimant was lying and had consumed alcohol every day the entire week he worked with Mr. Smith.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

⁴ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 2008 Supp. 44-501(a).

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁷

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.⁸

A claimant’s testimony alone is sufficient evidence of his own physical condition.⁹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.¹⁰

The testimony in this matter is diametrical. Claimant and Mr. Smith were at the same location at approximately the same time, but managed to generate completely different facts from that experience. One or the other appears to have generated an inaccurate description of the morning in question. The Board has, on many occasions, given deference to the ALJ’s ability to observe witness testimony in person and judge the credibility of those witnesses. Here, the ALJ found the testimony of claimant to be the more accurate. This Board Member agrees, and affirms the finding that claimant did suffer

⁷ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁸ K.S.A. 2008 Supp. 44-501(g).

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

¹⁰ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

an accidental injury which arose out of and in the course of his employment with respondent. The Order granting benefits in this matter is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that he suffered an accidental injury which occurred while he was performing work for respondent. This accidental injury arose out of and in the course of his employment with respondent, and the Order granting benefits should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 6, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

HONORABLE GARY M. KORTE

c: Steffanie L. Stracke, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

¹¹ K.S.A. 44-534a.